IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 3RD AUGUST 2007 / 12TH SRAVANA 1929

CRP.No. 1164 of 2004()

CMA.147/2003 of IV ADDL. DISTRICT COURT, ERNAKULAM
OS.162/1998 of ADDL.MUNSIFF COURT,KOCHI
(IA 1068/03 & 1069/03)
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REVN. PETITIONER: APPELLANT/PETITIONER/4TH DEFENDANT

MR.MUJEEB, PUTHENPURAKKAL HOUSE,
EDAVANAKKAD P.O., ERNAKULAM.

BY ADV. SRI.K.I.ABDUL RASHEED
SRI.N.M.MOHAMMED AYUB

RESPONDENTS: RESPONDENT/RESPONDENT/PLAINTIFF

MR.SATHYAN, S/O.BALAKRISHNAN,
KALLUMADATHIL HOUSE, EDAVANAKKAD VILLAGE,
EDAVANAKKAD P.O., ERNAKULAM.

BY ADV. SRI.T.H.ABDUL AZEEZ
SRI.T.B.HOOD

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 03/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CRP NO. 1164 OF 2004

ORDER ON I.A. NO. 2853 OF 2004 IN CRP NO. 1164 OF 2004

DISMISSED

03.08.2007 SD/- PIUS C. KURIAKOSE, JUDGE.

PIUS C. KURIAKOSE, J.

C.R.P. No. 1164 OF 2004

Dated this the 3rd day of August, 2007

O R D E R

In this CRP, the 4th defendant in a suit for specific performance of contract for sale of immovable property impugns the order of the trial court dismissing his application under Order IX Rule 13 to set aside ex-parte and another application for condonation of delay of 592 days caused in the matter of filing the main petition. The petitioner also impugns the judgment of the lower appellate court confirming the orders of the trial court. The trial court dismissed the application filed by the petitioner on the reason that though the petitioner claims to have filed an application under Order IX Rule 7, he has not disclosed as to what was the fate of that application. The Munsiff also found that the averments in the affidavit in support of the application to set aside the ex-parte decree sworn to by a clerk attached to the office of the advocate for the petitioner were in 'general way' and that there was no material or evidence to support those averments. Thus, concluding that no sufficient cause was made out for condonation of the delay, the delay petition was dismissed and as a consequence the main petition to set aside the ex-parte decree was also dismissed.

2. The learned District Judge in appeal on perusing the lower

court records did not become inclined to accept the case of the petitioner that he had as a matter of fact filed a petition to set aside the ex-parte order. He has concluded that no petition to set aside ex-parte order was filed on 12.10.01 or on any other day and on that basis concurred with the view of the learned Munsiff and confirmed the order dismissing the delay petition. According to the learned District Judge, it is a settled position that each and every day's delay should be satisfactorily explained. Apart from the reasons stated by the Munsiff, the learned District Judge also noticed that the appellant was the 4th defendant only and in view of his admission that the property had been assigned by him to the 5th defendant, the appeal was not maintainable. The situation of the 5th defendant not challenging the orders and not filing any appeal is of consequence and on that reason also he fortified his decision to dismiss the appeal.

3. I have heard Sri.K.I. Abdul Rasheed, learned counsel for the petitioner and Sri.T.H.Abdul Azeez, counsel for the respondent. Mr.Rasheed asserted before me that as a matter of fact, IA No.2356/01 under Order IX Rule 7 was filed on 12.09.01 along with the written statement of 4th and 5th defendants. Learned counsel supplied respective court fee numbers, 8772(for the IA) and 8773(for the written

statement). In view of the assertion of the learned counsel, I called for the entire records. The records were forwarded to this Court by the learned Munsiff along with his letter. The records do not contain either IA No.2356 of 2001 or the written statement filed by the 4th and 5th defendants on 12.09.01. The letter sent by the learned Munsiff to this court on 12.08.07 states that on verifying the IA register for 2001 a petition is seen filed by Advocate Sri.K.I. Abdul Rasheed to set aside ex-parte dt.23.08.01 on 12.09.01 and that IA was numbered as 2356/01. But the first order and final order on the IA were not entered in the register. In view of the above letter and on a perusal of the copies of the IA and written statement which were placed before me by Mr.Rasheed and on considering the totality of the circumstances which attend on this case I am inclined to accept the version of Sri.Rasheed that as a matter of fact on 12.09.01 IA no.2356/01 together with written statement was filed by defendants 4 and 5 jointly. Significantly, the learned Munsiff in his letter has sought more time to trace out the IA at the earliest.

4. Going by the copy of IA 2356/01, it is seen that the IA was supported by an affidavit sworn to by an advocate attached to the office of Sri.K.I. Abdul Rasheed. The averments in that affidavit are to the effect that the junior advocate could not reach the court on time due to

traffic block on 25.08.01. By the time the advocate reached the court the case was already called and parties, i.e., 4th and 5th defendants were also set ex-parte. The above affidavit is somewhat convincing. The learned Munsiff seems to have been under the impression that IA 2356/01 was filed only on 12.10.01, i.e., after the ex-parte decree was passed. In other words ordinarily IA 2356/01 would have been allowed by the court particularly since the written statement also had been filed by 4th and 5th defendants. But the learned District Judge on the contrary took the view that IA No.2356/01 had not been filed at all. That view was erroneous.

5. The only aspect to be considered now is whether the non-filing of CMA by the 5th defendant who has purchased the property from the revision petitioner-4th respondent will be of any consequence. Though it is true that the applications to set aside the ex-parte as well as the application for condonation of delay did not have the junction of the 5th defendant, those applications purported to be made on behalf of the 5th respondent also and the learned Munsiff understood those applications as filed on his behalf also. Significantly, the 5th defendant had already filed written statement in the suit along with the 4th defendant. The CMA and this Civil Revision Petition to the above extent can certainly be

considered as filed on behalf of the 5th defendant also. After all the policy of law is that all causes should be adjudicated on their merits and not on technical reasons such as delay. But at the same time it has to be found that the affidavit in support of the application for condonation of delay could have been more inspiring. The delay was considerable and the petitioner was expected to explain the delay in a much better way than he endeavoured to do.

6. Considering the rival submissions made at the Bar and the totality of circumstances attending on the case, I am of the view that the two applications filed by the petitioners can be allowed on terms. Accordingly, setting aside the orders of the learned Munsiff and the judgment of the learned District Judge I allow the Civil Revision Petition on condition that the petitioner pays a total amount of Rs.2,000/- by way of cost to the plaintiffs-respondents either directly or through their counsel in the court below or in this court within three weeks from today, failing which the impugned orders will stand confirmed and the Civil Revision Petition will stand dismissed. Once cost is paid, the order allowing the IAs will become operative and thereupon the trial court will trace out the written statement already filed by the petitioner and the 5th defendant, formulate issues on the basis of the contentions thereon and

try the suit and dispose of the suit in accordance with law. It is clarified that the ex-parte decree has been set aside only as against 4th and 5th defendants and not against the others.

The Civil Revision Petition is allowed as above.

PIUS C. KURIAKOSE, JUDGE

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